

MF 98-2

Tax Type: **MOTOR FUEL TAX**

Issue: **Audit Methodologies and/or Other Computational Issues
Unreported/Underreported Receipts (Non-fraudulent)**

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	Docket No.
v.)	Acct #
)	NTL #
JOHN DOE d/b/a)	NTL #
TAXPAYER)	
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Robert C. Wilson of Wilson & Cape for JOHN DOE d/b/a TAXPAYER.

Synopsis:

The Department of Revenue ("Department") conducted an audit of the business owned by JOHN DOE ("taxpayer") for two separate audit periods, January 1, 1988 through April 30, 1991 and May 1, 1991 through September 30, 1993. The Department issued a Notice of Tax Liability ("NTL") to TAXPAYER for each audit period. Both NTLs are for motor fuel tax, and the second NTL includes a penalty due to fraud. The taxpayer timely protested each NTL, and the cases were consolidated. After an evidentiary hearing was held, the taxpayer conceded that he owes \$2,981 of the assessment for the first audit period for unreported taxable diesel sales. For the

remaining assessments, the taxpayer has raised the following issues: (1) whether the taxpayer included excess evaporation losses in calculating the tax on his motor fuel tax returns during the first audit period; (2) whether the auditor made an improper adjustment of \$1,115 for the first audit period; (3) whether the taxpayer had sufficient documents to make tax-free sales of diesel fuel during the first audit period; (4) whether the taxpayer made sales of diesel fuel from the service station for which tax was not paid during both audit periods; and (5) whether the taxpayer is liable for a fraud penalty. After reviewing the record, it is recommended that this matter be resolved partially in favor of the taxpayer and partially in favor of the Department.

FINDINGS OF FACT:

1. JOHN DOE operates a sole proprietorship known as TAXPAYER. The purpose of the business is to distribute motor fuel. (Tr. pp. 7-8, 155-56)

2. The business operates both a plant from which fuel is sold in bulk and a service station from which gasoline and diesel fuel are sold at retail. (Tr. pp. 7-8, 10, 155-56)

3. The Department conducted an audit of the business for the periods of January 1, 1988 through April 30, 1991 and May 1, 1991 through September 30, 1993. (Tr. p. 8)

4. The auditor determined that the taxpayer owes \$2,981 on unreported taxable sales of diesel fuel during the first audit period. The taxpayer does not contest this issue. (Tr. p. 11; Taxpayer's brief p. 5)

Evaporation Allowance

5. The auditor determined that during the first audit period, the taxpayer took more than 1½% allowance for gasoline evaporation losses on the taxpayer's motor fuel

tax returns. The auditor prepared a worksheet that shows the taxpayer owes additional tax in the amount of \$9,138 for this error. (Taxpayer Ex. #1; Tr. p. 9)

6. The auditor concluded that the taxpayer overstated the evaporation losses after the auditor compared the amount of fuel on the delivery tickets with the amount of evaporation loss claimed on the taxpayer's motor fuel tax returns. The auditor determined that the evaporation loss claimed by the taxpayer was in excess of 1½% of the fuel available for the loss for most of the months during the first audit period. (Taxpayer Ex. #1; Tr. p. 13)

7. A comparison of the Department's record concerning the returns filed by the taxpayer and the auditor's worksheet reveals that the auditor used the wrong numbers for the loss claimed by the taxpayer on his motor fuel tax returns for the following months: May 1988, March 1989, October 1989, November 1989, December 1989, March 1990, May 1990, June 1990, July 1990, August 1990, November 1990, December 1990, January 1991, and February 1991. (Taxpayer Ex. #1, 2)

8. Other than the auditor's worksheet and the Department's record of the returns filed, the taxpayer did not provide documentary evidence indicating that the taxpayer did not overstate the evaporation losses for the remaining months in the first audit period.

Taxable Gasoline Sales

9. The auditor determined that the taxpayer owed additional tax in the amount of \$1,115 for the first audit period for an adjustment due to taxable gasoline sales where the taxpayer failed to remit the tax to the Department. The auditor reviewed the taxpayer's sales invoices in order to make this adjustment. (Taxpayer Ex. #3; Tr. pp. 10, 14)

10. The taxpayer did not present any documentary evidence showing that the auditor's assessment of \$1,115 for taxable sales of gasoline was incorrect.

Documents from Customers

11. The auditor sampled the sales invoices for deliveries of tax-free diesel fuel from the bulk plant to various customers in order to verify that the taxpayer had a Form IDR-648 from each customer.¹ The auditor sampled the first six months of 1988 and the first six months of 1990. The auditor then projected these figures for the first audit period. (Taxpayer Ex. #4, 5, 6; Tr. pp. 15, 36-39, 42-46)

12. The auditor determined that the taxpayer owed \$43,188 for tax-free sales of diesel fuel made to customers for which there was not a sufficient IDR-648 from the customer. (Taxpayer Ex. #4; Tr. pp. 43-44; 56-57)

13. The taxpayer did not present any of the IDR-648s to show that he did not owe this assessment. The taxpayer did not present written verification that one of the Department's employees, Ted Teegarden, told the taxpayer that he did not have to pay this portion of the assessment.

Diesel Fuel Sales from the Service Station and Fraud

14. The majority of the taxes assessed in this case result from the sale of diesel fuel at the service station for which the auditor claims that no tax was paid. The auditor determined that this error results in additional tax of \$117,376 for the first audit period and \$131,161 for the second audit period. (Dept. Ex. #3, 4; Tr. pp. 12; 16-17, 22)

15. All of the diesel fuel that was sold at the service station went through the bulk plant. (Tr. p. 111)

¹ The Department requires a seller to obtain a Form IDR-648 from each purchaser of tax-free diesel fuel. (86 Ill.Admin.Code, ch. 1, §500.210).

16. The auditor did not receive any documentation from the taxpayer showing that sales made from the service station were billed from the bulk plant. (Tr. p. 55)

17. In order to determine the amount of diesel fuel that was sold from the service station during the first audit period, the auditor looked at the pump readings that were recorded on the taxpayer's Daily Sales Sheets. The pump readings were recorded in the lower left-hand corner of the Daily Sales Sheets. (Dept. Ex. #2, p. 2; Tr. p. 21)

18. The auditor used the pump readings from the Daily Sales Sheets to determine that the total gallons of diesel fuel sold from the service station was 649,985 for the first audit period. He then calculated the tax due on these gallons and subtracted the amount of tax that the taxpayer already paid to determine that the taxpayer owes \$117,376 on these gallons. (Dept. Ex. #3; Tr. p. 17)

19. For the second audit period, the meter readings were not located in the lower left-hand corner of the Daily Sales Sheets as they had been for the first audit period. The taxpayer did not explain to the auditor where they were kept. (Tr. pp. 19-20)

20. The auditor reviewed the taxpayer's documents with another auditor and determined that the amount listed under "credit card starts" on the right-hand side of the Daily Sales Sheet was the amount of the tax-free diesel sales for the day. The Daily Sales Sheets for the first audit period did not have an amount listed under "credit card starts." (Dept. Ex. #2; Tr. pp. 20-22)

21. The auditor took the credit card starts of the day and added that up for every day during the second audit period. He grouped them according to monthly totals. He then divided this by the amount that tax-free diesel was selling for at the beginning of

every month to determine the number of gallons that were sold tax-free out of the retail facility. (Dept. Ex. #5; Tr. pp. 19-23, 54)

22. After calculating the number of gallons that were sold tax-free, the auditor determined the tax on those gallons. The auditor's calculations show that the taxpayer sold 610,050 gallons of diesel fuel from the service station during the second audit period. (Dept. Ex. #4)

23. A former employee of the taxpayer, JIM DOE, worked for the taxpayer from 1986 to September of 1992 and was responsible for recording meter readings from the various pumps on the taxpayer's books and records. He recorded the meter readings on a daily basis. (Tr. p. 58)

24. JIM DOE initially recorded the pump readings in the lower left-hand corner of the taxpayer's Daily Sales Sheets. Sometime later the taxpayer told him to record the pump sales on the right side of the sheet under "credit card starts." (Dept. Ex. #2; Tr. pp. 59-60)

25. The taxpayer told JIM DOE to put the meter readings from the pumps on a separate sheet of paper and staple it to the front of the Daily Sales Sheet. (Tr. pp. 76-77)

26. The amount of diesel fuel sold at the retail facility was recorded on the Daily Sales Sheet as "credit card starts." (Tr. p. 77)

27. The auditor did not try to reconcile all of the taxpayer's purchases with all of the fuel on which tax was paid. (Tr. p. 49)

28. The taxpayer prepared summaries of the gallons that the taxpayer claims were sold from the retail facility but invoiced from the bulk facility for each year in question. The Department stipulated that the taxpayer has an invoice for each of the sales listed on

the summaries. The invoices do not show that the fuel was pumped at the retail facility. (Taxpayer Ex. #7-12; Tr. pp. 65, 161)

29. The taxpayer has no document showing that the fuel listed on the summaries was pumped at the retail facility. (Tr. p. 161)

30. The taxpayer has no documents to verify the amount of fuel that was sold by the retail facility and billed through the bulk plant. (Tr. p. 163)

31. The taxpayer's accountant, RON DOE, prepared a summary of the total gallons of fuel purchased and sold by the taxpayer during both audit periods. (Taxpayer Ex. #13, 14)

32. The accountant's summary for the first audit period shows that the taxpayer purchased a total of 7,440,177 gallons of fuel. The figures for the gallons purchased were obtained from either the taxpayer's invoices or purchase orders. (Taxpayer Ex. #13; Tr. pp. 91-92, 130)

33. The accountant's summary for the first audit period shows that the taxpayer sold a total of 7,130,059 gallons of diesel fuel from the bulk plant and 649,985 from the service station. The figures for the gallons sold were obtained from the sales journals and reconciled with the motor fuel tax returns. (Taxpayer Ex. #13; Tr. pp. 89-90, 96-97)

34. The accountant assumed that the 7,130,059 gallons of diesel fuel sold from the bulk plant include the 649,985 gallons sold from the service station. (Tr. p. 135)

35. The taxpayer's accountant did not explain how the fuel pumped from the retail facility was accounted for from the pump to the tax return. He did not know how the taxpayer accounted for fuel that was sold at the retail facility and billed through the bulk plant. (Tr. pp. 138-143)

36. For the second audit period, the accountant prepared a similar compilation showing the total gallons sold and purchased. The total gallons sold from the station were taken from the station journals. (Taxpayer Ex. #14; Tr. pp. 104-107)

37. The accountant's summary for the second audit period shows that a total of 98,689 gallons of diesel fuel were sold from the service station. (Taxpayer Ex. #14)

38. The taxpayer did not submit any of the supporting documentation that the accountant used to prepare the summaries of the total gallons purchased and sold.

39. On November 22, 1991, the Department prepared a corrected tax return for the first audit period showing motor fuel tax due in the amount of \$173,799, plus a 10% penalty of \$17,380. On July 1, 1994, the Department prepared a corrected tax return for the second audit period showing motor fuel tax due in the amount of \$131,161, plus a 30% fraud penalty of \$39,348. The corrected returns were admitted into evidence under the certification of the Director of the Department. (Dept. Group Ex. #1).

CONCLUSIONS OF LAW:

Section 21 of the Motor Fuel Tax Act (Ill.Rev.Stat. 1989, ch. 120, ¶417 *et seq.*) (now 35 ILCS 505/1 *et seq.*), incorporates by reference sections 4 and 5 of the Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*), which provide that the certified copy of the corrected return issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 ILCS 505/21; 120/4, 5. Once the Department has established its *prima facie* case by submitting the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. A.R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 832 (1st

Dist. 1988). To prove its case, a taxpayer must present more than its testimony denying the accuracy of the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1st Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill.App.3d 1036, 1039 (2nd Dist. 1978). The taxpayer must present sufficient documentary evidence to support its claim. Id.

Evaporation Allowance

The taxpayer argues that the amount assessed for the taxpayer's overstatement of the evaporation losses should be dismissed because the auditor erred in calculating the additional tax owed. For the first audit period, the auditor compared the fuel listed on the delivery tickets with the amounts shown on the taxpayer's motor fuel returns as evaporation loss allowances. The auditor concluded that the taxpayer had taken more than the maximum allowable loss for almost every month during the audit period. Under cross-examination, the auditor admitted that for four separate months (March, May, June, and August of 1990), he used incorrect figures as the amount of the evaporation loss claimed on the taxpayer's returns. (Tr. pp. 28-33) The Department argues that although the auditor admitted that he determined the tax incorrectly for those four months, the taxpayer has failed to show by sufficient evidence that the same incorrect method was used for the remaining 36 months of the audit period.

The taxpayer submitted two documents in support of his position on this issue: (1) the auditor's worksheet, which shows how he calculated the additional tax due; and (2) the Department's record of the taxpayer's motor fuel returns, which shows the numbers that were reported on the returns. On the worksheet, the auditor has a column

entitled “loss claimed,” which includes figures claimed as evaporation loss by the taxpayer on his returns.

A comparison of both documents reveals that the auditor used figures under the “loss claimed” column that were different than the figures reported on the motor fuel tax returns for the months of May of 1988, March, October, November, and December of 1989, March, May, June, July, August, November and December of 1990, and January and February of 1991. Because the auditor used the wrong figures for these months, the tax due for the overstatement of the evaporation losses must be recalculated for these months, and the assessment should be reduced accordingly. Because the taxpayer has failed to present any documentary evidence to rebut the Department’s *prima facie* case concerning the remaining months, the assessment for those months should be upheld.

Taxable Gasoline Sales

The taxpayer contends that the assessment for the first audit period should be reduced by \$1,115 because under cross-examination, the auditor was unable to remember how he arrived at this adjustment. The Department argues that under direct examination, the auditor stated that this portion of the liability represented tax collected from the customers but not remitted to the Department. The Department also claims that this portion of the assessment must be upheld because the taxpayer has failed to present any evidence showing that it should not be assessed.

Under section 4 of the ROTA, the Department is required to correct the tax return according to its "best judgment and information." 35 ILCS 120/4. There is no requirement that the Department substantiate the basis for its corrected return at the hearing. Masini v. Department of Revenue, 60 Ill.App.3d 11, 14 (1st Dist. 1978). When

the corrected return is challenged, however, the method that was used by the Department in correcting the return must meet a minimal standard of reasonableness. Id.; Elkay Manufacturing Co. v. Sweet, 202 Ill.App.3d 466, 470 (1st Dist. 1990).

The taxpayer has failed to present any evidence challenging this portion of the assessment. When the auditor was questioned about this issue, he said that he generally prepares a back-up worksheet, but could not find it right at that moment. (Tr. pp. 35-36) The taxpayer has not indicated that he requested the auditor's worksheets during discovery. In addition, until the taxpayer presents evidence identified with its books and records, it is presumed that the Department's determination is correct. The taxpayer has failed to overcome the Department's *prima facie* case on this issue.

Documents from Customers

The auditor determined that during the first audit period, the taxpayer did not have sufficient IDR-648s on file for customers to whom the taxpayer sold fuel tax-free. The taxpayer testified that the audit supervisor, Ted Teegarden, told the taxpayer that the IDR-648s that the taxpayer had from two of its customers, FICTITIOUS CUSTOMER and FICTITIOUS CUSTOMER, would be acceptable. (Tr. pp. 159-60) The taxpayer's accountant testified that during a meeting with the taxpayer's and the Department's representatives, Teegarden said that there was not a problem with the IDR-648s and that the \$43,188 would not be assessed. (Tr. pp. 85-89) The taxpayer argues that he does not owe this tax because one of the Department's employees had agreed that the IDR-648s were sufficient. The taxpayer claims that the Department is estopped from assessing the additional tax of \$43,188 based on the employee's statements. The Department argues that it is not bound by the statements.

An agency only has authority given to it by the legislature through the statute. Davis v. Chicago Police Board, 268 Ill.App.3d 851, 856 (1st Dist. 1994). Because there is no statutory authority to apply equitable principles regarding this issue, it cannot be recommended that the Department be estopped from assessing the tax.

Even if equitable estoppel could be applied, the facts do not warrant applying estoppel against the Department. The doctrine of estoppel is applied against the State only to prevent fraud and injustice. Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410, 431 (1996). This is especially true when public revenues are involved. Id. The State is not estopped by any mistakes made or misinformation given by a Department employee with respect to tax liabilities. Id. at 432.

Although the Taxpayers' Bill of Rights Act provides that the Department has the authority to abate taxes and penalties assessed based upon erroneous written information or advice given by the Department (see 20 ILCS 2520/4(c)), in this case the taxpayer did not present any written verification that Teegarden agreed to drop this portion of the assessment. The taxpayer did not call Teegarden as a witness to verify that these statements were made; the only evidence presented by the taxpayer was self-serving statements from him and his accountant. Even assuming that Teegarden made such representations, the Department is not bound by these statements. Because the taxpayer has failed to present any other evidence concerning this issue, this portion of the assessment must be upheld.

Diesel Fuel Sales from the Service Station and Fraud

The auditor determined that the taxpayer failed to pay tax on diesel fuel sold from the service station during both audit periods. For the first audit period, the auditor

reviewed the taxpayer's Daily Sales Sheets, which showed daily diesel pump readings in the lower left-hand corner. The auditor calculated the amount of tax that was owed on the diesel fuel pumped out of the service station, and subtracted the amount of tax that was already paid by the taxpayer to determine the amount owed.

For the second audit period, the auditor testified that the meter readings "disappeared" because they were not located in the lower left-hand corner of the Daily Sales Sheets as they had been for the first audit period. When the auditor asked the taxpayer where the meter readings were kept, the taxpayer did not explain to him where they were kept. (Tr. pp. 19-20) Because the auditor did not receive information concerning the location of the pump readings, he asked another auditor to review the taxpayer's information. Both auditors determined that the amount listed under "credit card starts" on the right-hand side of the Daily Sales Sheets was the amount of tax-free diesel fuel sales in dollars, not gallons. (Tr. pp. 54-55) For the first audit period, no amount was shown under "credit card starts" on the Daily Sales Sheets. The auditor believed that the "credit card starts" were the amount of the tax-free diesel sales because the diesel pump readings and sales were not shown anywhere else on the taxpayer's documents, and the taxpayer did not show that the "credit card starts" were actually credit card sales. The auditor used these figures to calculate the amount owed for the second audit period.

A former employee of the taxpayer, JIM DOE, testified that he worked for the taxpayer from 1986 to September of 1992 and was responsible for recording meter readings from the various pumps on the taxpayer's books and records. He did this on a daily basis. Initially JIM DOE recorded the pump readings in the lower left-hand corner

of the taxpayer's Daily Sales Sheets. He stated that sometime later the taxpayer told him to record the pump sales on the right side of the sheet under "credit card starts." (Tr. pp. 59-60) Cy Henshaw, a special agent with the Bureau of Criminal Investigation for the Department said that he interviewed JIM DOE on March 24, 1994. JIM DOE told Henshaw that he was told by the taxpayer to put the meter readings from the pumps on a separate sheet of paper and staple it to the front of the Daily Sales Sheet. (Tr. pp. 76-77) JIM DOE told Henshaw that the amount of diesel fuel sold at the retail facility was recorded on the Daily Sales Sheet as "credit card starts." (Tr. p. 77) Also, Henshaw testified that the taxpayer told him that a truck had damaged the pumps and therefore the taxpayer was unable to keep meter readings. (Tr. p. 78) Henshaw stated that the taxpayer admitted in a meeting with the Department's representatives and the taxpayer's representatives that the diesel fuel sales were listed under the "credit card starts." (Tr. p. 78)

The taxpayer asserts that the auditor's testimony is "more than enough" to rebut the Department's *prima facie* case. (Taxpayer's brief, p. 5) Because the auditor admitted that he did not reconcile all of the purchases with all of the gallons on which tax was paid, the taxpayer contends that he has overcome the Department's *prima facie* case. As previously stated, however, the Department is required to correct the return according to its best judgment and information. The auditor explained how he prepared the corrected returns and testified that based on the information that was given to him, it was the best conclusion that could be reached. His method of preparing the corrected returns meets a minimal standard of reasonableness.

Although the taxpayer claims that the auditor should have reconciled the total purchases with what the taxpayer paid taxes on, the taxpayer did not present any evidence indicating that he prepared his own reconciliation. Even though the taxpayer presented summaries showing total purchases and total sales for both audit periods, the taxpayer has not shown that the summaries reconcile with the tax returns. Also, the information on the summaries prepared by the accountant does not reconcile with the information on the summaries prepared by the taxpayer. For example, the accountant determined that 98,689 gallons of fuel were sold from the service station during the second audit period. (Taxpayer Ex. #14). The summaries prepared by the taxpayer, however, indicate that 525,132 gallons were sold from the service station during the same time period. (Taxpayer Ex. #10, 11, 12). Not only has the taxpayer failed to present the documentation that was used to prepare exhibits 13 and 14, he has also failed to explain this discrepancy. The taxpayer's accountant was unable to explain how the fuel pumped from the retail facility was accounted for from the pump to the tax return. He did not know how the taxpayer accounted for fuel that was sold at the retail facility and billed through the bulk plant. (Tr. pp. 138-143)

The taxpayer argues that the "Department has offered no credible evidence that the pump readings were an accurate record of the amount of fuel that went through the service station" or "that the credit card starts were indeed diesel fuels." (Taxpayer's brief, p. 8) The taxpayer apparently misunderstands that he bears the burden of proving the Department's determination is incorrect. Although Henshaw's testimony indicates that at one point one of the taxpayer's pumps was broken (Tr. p. 78), the taxpayer did not provide any evidence showing when this happened or how long the pump was broken.

The taxpayer also emphasizes the fact that at one point in the transcript, the auditor stated that “the pump readings were an inaccurate record of the amount of fuel that went through the service station.” (Tr. p. 12) It is clear from the record, however, that this was a misstatement on the part of the auditor. It is obvious from the auditor’s testimony immediately prior to this statement and throughout the hearing that he relied on the pump readings as an accurate record of the fuel that went through the station. Moreover, both the taxpayer and the auditor concluded that 649,985 gallons of diesel fuel were sold from the service station during the first audit period. (Dept. Ex. #3; Taxpayer’s Ex. #13) Because they both arrived at the same conclusion, it is difficult to understand how the taxpayer can now argue that the pump readings are not an accurate record of the amount of fuel that went through the service station.

With respect to the credit card starts, the taxpayer claims that the auditor erred by assuming that they were tax-free sales of diesel. Once again, the taxpayer has failed to present evidence showing that the credit card starts were **not** tax-free sales of diesel fuel or that they were actually credit card sales. The auditor explained how he reached his conclusions concerning the credit card starts, and the taxpayer did not present any evidence to the contrary. Given the information that the auditor had to work with, it appears reasonable to conclude that the credit card starts were the tax-free diesel fuel sales.

The taxpayer also argues that Henshaw’s testimony concerning the credit card starts contradicts the auditor’s testimony. JIM DOE told Henshaw that the taxpayer told him to put the meter readings on a separate sheet of paper and staple it to the front of the Daily Sales Sheet. The taxpayer contends that this contradicts the auditor’s testimony

because the auditor stated that the credit card starts were the diesel fuel sales. It is clear from the record that Henshaw's testimony is consistent with the auditor's testimony. According to Henshaw, JIM DOE put the meter readings, in gallons, on a separate sheet of paper and stapled it to the Daily Sales Sheets. JIM DOE then put the diesel fuel sales, in dollars, under credit card starts. This is consistent with the auditor's testimony that the credit card starts were the amount of diesel fuel sales, in dollars.

The taxpayer claims that the auditor's assessment results in tax being paid twice on the gallons that were billed through the bulk station. The taxpayer admitted, however, that there are no documents to show that fuel sold from the service station was billed through the bulk station. Because the taxpayer has failed to present documents showing that tax has already been paid on the fuel that was sold from the service station, the Department's determination must be upheld.

Finally, the taxpayer claims that the evidence is insufficient to assess the fraud penalty under section 4 of the ROTA. The taxpayer's intent for purposes of the fraud penalty may be shown by circumstantial evidence. Vitale v. Department of Revenue, 118 Ill.App.3d 210, 213 (3rd Dist. 1983). In this case, the taxpayer told his employee to change the method for reporting the diesel pump readings and diesel sales for the service station. During the first audit, this information was clearly recorded on the Daily Sales Sheets. During the second audit, this information was not on the daily sheets, and when the auditor asked the taxpayer for the information, the taxpayer did not give it to him. The taxpayer has not presented any evidence showing where the meter readings were recorded for the second audit period. Under these circumstances, the fraud penalty was properly imposed.

Recommendation

For the foregoing reasons, it is recommended that the taxpayer's liability for the first audit period be recalculated for the evaporation loss adjustment for the following months: May of 1988, March, October, November, and December of 1989, March, May, June, July, August, November and December of 1990, and January and February of 1991. It is further recommended that the remaining assessments be upheld, including the fraud penalty.

Linda Olivero
Administrative Law Judge